Chapter 700 Wellhead Protection: Siting Facilities That Pose a Threat to Drinking Water

Basis Statement

The requirements of the rule support the implementation of Maine's new wellhead protection law, Wellhead Protection 38 MRSA §§1391-1399. The purpose of the law as stated in section 1391 is "to protect the health, safety and welfare of Maine's citizens by establishing a coordinated statewide program to protect drinking water wells from contamination by oil or hazardous substances." The law accomplishes this purpose mainly by restricting the siting of facilities that, by their nature, pose an unacceptable risk to groundwater quality and therefore should be kept away, if at all possible, from drinking water supplies, including sand and gravel aquifers mapped by the Maine Geological Survey. These aquifers are the most cost effective potential future public water sources for Maine communities fortunate enough to have them but they are particularly vulnerable to contamination because of their inherent permeability. Chapter 700 furthers the purpose of the law by establishing the siting restrictions that apply to facilities that pose a significant threat to drinking water, which include: automobile graveyards; automobile body or other commercial automobile maintenance and repair facilities; dry cleaning facilities that use perchloroethylene; metal finishing or plating facilities; and commercial hazardous waste facilities.

The rule establishes provisions for variances in a number of instances: 1) when it has been demonstrated that there is no hydrological connection between the facility and the water supply at issue; 2) when it has been affirmatively demonstrated that the aquifer has been incorrectly mapped; 3) when it has been affirmatively demonstrated that the aquifer has a potentially low use or is polluted; or 4) when an applicant has demonstrated that the facility will be designed and installed to further reduce the risk of discharges of oil and the likelihood of future ground water contamination.

The variance provisions of the rule include specific engineering, siting and monitoring criteria to ensure that the intent of the enabling legislation is met. The rule also establishes application, public notice and public meeting requirements as otherwise set forth in Rules Concerning the Processing of Applications and Other Administrative Matters, 06-096 CMR 2 (last effective date April 1, 2003).

The Board of Environmental Protection received a number of comments on this rule during a public hearing held August 6, 2009 in Augusta, Maine. Written comments were accepted in the record until 5:00 P.M. on August 17, 2009.

RESPONSE TO COMMENTS

List of Commentators

LA	Leslie Anderson, Director of Risk Management, Dead River Company
WB	William Bell, Maine Automobile Recyclers Association
BG	Ben Gilman, Maine Oil Dealers Association (MODA)

1) We submit these comments requesting clarification in the proposed rule Chapter 700 pertaining to the definition of "automobile maintenance and repair facility" (2.B). The definition in the proposed rule is: "automobile maintenance and repair facility" means any commercial facility engaged in the repair or replacement of car, truck and van, motorcycle, or other motorized vehicle, mechanical or exhaust components, or in the replacement of motor oil and other lubricants or fluids". Our request for further clarification within the rule is specific to the terminology "**commercial**". Our garages are for our own fleet, we do not consider them "commercial" because they are not open to the public, nor do we engage in any repair or replacement of parts, the replacement of motor oil or other lubricants and fluids for a fee to customers.
Our vehicles are considered commercial vehicles, for both licensing with the state, and because they are engaged in commercial activities. We do not believe however, that it was the intent of the underlying legislation PL 2007, Chapter 569 to extend the prohibition of siting of certain facilities, to private fleet maintenance garages. Further clarification with the addition of "commercial facilities, offering repair or replacement of car, truck and van, motorcycle or other motorized vehicle mechanical or exhaust components, or in the replacement of motor oil and other lubricants and fluids, **with such services and goods offered for purchase by a third-party and services offered for a fee".**

We believe this amendment mirrors the underlying intent of Chapter 569, and clarifies the applicability to commercial facilities which offer the sales of goods and services to third-parties. (LA)

Response: *We agree that the definition should be clarified but believe the legislative purpose of the wellhead protection law is best fulfilled by a broader reading of the term "commercial" than that urged by this comment. The purpose of the law is clearly stated in the wellhead statute at 38 MRSA §1391:*

> *The Legislature finds and declares it to be the policy of the State, consistent with its duty to protect the health, safety and welfare of its citizens, to establish a coordinated statewide program to protect drinking water wells from contamination by oil or hazardous waste. The Legislature further finds that spills of oil and hazardous waste pose a significant risk to groundwater quality and that*

> *the handling of those substances near drinking water wells should be restricted to reduce the risk of contamination.*

The Legislature carried out this purpose by restricting the location of facility types that routinely involve the handling of oil and hazardous substances and thus entail an inherent risk of contaminant releases. It is the nature of the activity and not the business context in which it is carried out that matters most under the law.

In the case of automobile maintenance and repair facilities, the fact that an oil change or other service is performed on a business's own vehicle as opposed to the vehicle of a customer has no apparent bearing on the risk of a spill. We could find nothing in the record to suggest that the Legislature intended to make a regulatory distinction on this basis. We, in fact, found no evidence that this matter was discussed during the Legislature's deliberations leading to enactment of the bill. Our recollection is that the word "commercial" was employed by department staff when the bill was drafted to avoid any implication that the restrictions would apply to do-it-yourself auto mechanics working on their personal vehicles at home.

We have clarified that the restrictions apply to fleet garages operated by a commercial enterprise by amending the definition to read:

> *"Automobile maintenance and repair facility" means "commercial facilities, including fleet garages, offering repair or replacement of car, truck and van, motorcycle or other motorized vehicle mechanical or exhaust components, or in the replacement of motor oil and other lubricants and fluids,*

2) 38 M.R.S. §1394, specifically allows the Commissioner to consider other relevant factors when determining whether to grant a variance. "… [T]he commissioner may consider the importance of the groundwater resource, the hydrology of the site, and other relevant factors". We would urge the Department to add a provision to allow the commissioner to also consider the replacement or expansion of a facility which may occur on property not contiguous to the existing facility, but which may have been owned by the applicant with the intent to use for a replacement or expansion. It is conceivable that an applicant may have owned a non-contiguous parcel of land for a significant period of time, with such hopes for further expansion or replacement of an existing facility. Under the proposed rule, section 3.A.2 does not allow the commissioner to undertake such consideration in a variance hearing. The proposed rule only allows for a replacement or expansion at an existing facility on the "same property". We believe that the opportunity should be provided for an applicant to demonstrate that ownership of a non-contiguous parcel of land near the existing facility has been under the same ownership for the purposes of replacement of expansion. (LA)

Response: 38 M.R.S A.§ 1393(2)(B) and Chapter 700(3)(A)(2) and (4)(A)(2) specifically exempt the replacement or expansion of facilities that pose a significant threat to drinking water as defined in Chapter 700 in existence on September 30, 2008 as long as the replacement or expansion occurs on the same property and the facility meets all

applicable requirements of law. It is the department's conclusion that the enabling legislation clearly defined those situations whereby existing facilities would be allowed to be replaced or expanded and that the development of future facilities would be subject to the variance criteria set forth in the legislation and as further defined in the rule. The variance criteria in the legislation and in the rule are based entirely on considerations of groundwater resources and the hydrology of a particular site and engineering and monitoring measures that would effectively minimize potential impacts to drinking water supplies. Although the legislation does allow the department to consider other relevant information in determining whether to grant a variance, it is the department's position that only technical or scientific information relevant to site conditions and/or engineering and design factors should be considered. The department does not consider the ownership of non-contiguous parcels of land as valid criteria in considering whether to grant a variance.

3) Section 4. E prohibits the granting of a variance for any part of a proposed facility which overlies any "mapped aquifer that has high potential". Because there is a strict prohibition, it will be important that the mapping of the aquifer has been undertaken as precisely as possible. We would encourage the addition of the term "correctly" to be inserted before the words "mapped aquifer". Conversely, if the Department does not wish to refer to "correctly mapped aquifers", we would encourage the Department to allow an applicant to provide information which may demonstrate an error in the mapping. (LA)

Response: According to Robert Marvinney, State Geologist and Director of the Maine Geological Survey, mapped high yield aquifers represent only 3.5% of the mapped aquifer area in the State. In almost every instance, they have been identified by the presence of high yield wells. There is actual empirical evidence that these areas can support wells with yields > 50 gallons per minute. Given the small percentage of mapped aquifers that are designated as high yield and the direct relationship of mapped high yield areas to existing high yield wells, the department considers it prudent to restrict development in these areas and not to allow for variances.

The department does not feel it is the appropriate entity to render decisions on the accuracy of the mapping of high yield aquifers by the Maine Geological Survey, or ground water resource protection zones as designated in municipal ordinances or LURC zoning rules.

While the department stands by its position to disallow variances under section 4(E), language has been added to address an apparent conflict with section 4(B) Variance for incorrectly mapped aquifer. The phrase "Notwithstanding section 4(B)," has been added to the beginning of the first paragraph in section 4(E). This is to clarify that no variances are allowed in high potential aquifers.

To address the comment, the department has included a note in this section that directs an applicant to those entities responsible for the mapping or identification regarding appropriate changes.

4) How does the rule apply to the expansion of automobile recyclers who were in existence prior to 2008? (WB)

Response: Section 3(A)(2), Exceptions, provides that the rule does not apply to the replacement or expansion of a facility in existence on September 30, 2008 as long as the replacement or expansion occurs on the same property and the facility meets all applicable requirements of law.

5) There are several references in the proposed rules to "application by the owner of a proposed facility," MODA proposes to change the language of owner to "applicant" or "or owner or applicant." There could be situations that arise when that someone other than an owner might apply for a variance for a proposed facility at a location that they do not own. For example the sale of the location could be dependent of approval of the variance and the person applying for the variance is the purchaser and not the owner. This change in language would help address this case. MODA would recommend changing the term "owner" to "applicant." (BG)

Response: The Department agrees and has eliminated the definition of "owner" and replaced the term owner with the term "applicant" as it applies to application requirements throughout the rule. Section 5 of the draft rule requires that an application meet the requirements of the 06-096 CMR 2(11)(D) that sets forth the application requirements for title, right or interest, including but not limited to, ownership, an option to buy or leasing agreements. This change is consistent with other Department rules governing application requirements.

This comment was directed to the draft of Chapter 692, Siting of Oil Storage Facilities, posted to public hearing and comment on June 18, 2009 but is equally applicable to Chapter 700, which was also posted to public hearing and comment on June 18, 2009. We have made the suggested changes to both rules for consistency.